Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DONNIE F. COLLUM,

Petitioner,

v.

NEIL BURL CAIN, Warden
Louisiana State Penitentiary,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID W. HUTTON, JR.
Counsel of Record
115 West Madison St
Courthouse Square
Pulaski, TN 38478
(931) 363-6545

ANDRE LA PLACE
2762 Continental Drive
Suite 103
Baton Rouge, LA 70808

Attorneys for Petitioner

4 1PP

QUESTIONS PRESENTED

1. Whether juvenile Petitioner's confession was freely, voluntarily, knowingly and intelligently made in conformance with his Fifth, Sixth and Fourteenth Amendment rights of the United States of Constitution and its State counterparts under the Louisiana State Constitution.

2. Whether juvenile Petitioner should have received the benefit of retroactivity of new law which was well founded both then and now in compliance with the edicts of *Teague v. Lane*, 489 U.S. 299, 109 S.Ct.1060, 103 L.Ed 2d 334 (1989), and its progeny.

LIST OF PARTIES

The parties to the proceeding below were:

Donnie Collum, Petitioner
Camp C Bear Z Doc# 88439
Louisiana State Penitentiary
Angola, Louisiana 70712

N. Burl Cain, Warden
Louisiana State Penitentiary
Angola, Louisiana 70712

Walter K. Naquin, District Attorney, Parish of LaFouche
17th Judicial District
Thibodeaux, Louisiana 79302

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The petitioner, Donnie Collum respectfully requests that this Court issue a Writ of Certiorari to review the decision of both the Louisiana Supreme Court and the United States Court of Appeals for the Fifth Circuit, entered on October 27, 1998.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fifth Circuit denying Certificate of Appealability and Motion to proceed In Forma Pauperis is unreported yet reflected as case number 98-30264 and is reproduced at Appendix A and B. This affirmed the lower court order in its entirety. In addition an order denying Habeas Corpus relief of the United States District Court for the Eastern District of Louisiana is unreported and is reflected as case number 97-1432 section G.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit denying a motion for Certificate of Appealability was issued on September 14, 1998. A petition for panel reconsideration was subsequently filed and denied by the Court of Appeals on October 27, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1), 28 U.S.C. § 2241 *et seq. See* Supreme Court Rule 13.

STATUTORY PROVISIONS INVOLVED

Habeus Corpus relief at 28 U.S.C. § 2254(a) and 28 U.S.C. § 2253(c)(2) concerning Certificate of Appealability.

STATEMENT OF THE CASE

This petition presents an important question of federal criminal law which deals with the Fifth and Sixth Amendment rights of juveniles after having been arrested for a criminal offense. Specifically, the heightened protection afforded them by all states and mandated by the United States Constitution as early as this Court's decision in *Haley v. Ohio,* 332 U.S. 596, 68 S.Ct. 302, (1948); *Mackey v. United States,* 401 U.S. 667, 681, 91 S.Ct. 1160, 1174, 28 L.Ed 2d 404 (1971).

This scenario becomes all the more important when a change in the law occurs while a juvenile petitioner's case is on direct appeal for these violations wherein a change of law is enunciated yet denied retroactive application. As this case demonstrates, this issue is one that is "implicit in the concept of ordered liberty," citing, *Teague v. Lane,* 489 U.S. 307, 109 S.Ct. 1073-74, 103 L.Ed 2d 334 (1989).

I. Factual Background

On May 27, 1977, petitioner's father, step-mother and their two children were killed in their trailer home in the Four Point Heights subdivision in the town of Raceland, in Lafourche Parish, Louisiana.

Two days later petitioner, who was then fifteen (15) years of age and his brother, Scott Collum, age thirteen, were stopped by police officers in Benson, Arizona, driving a 1974 Cadillac automobile. The brothers admitted the Cadillac belonged to their father, and that they had taken it without permission. The Arizona authorities retain custody of the automobile and the boys were turned over to their mother, Ms. Peggy Mendoza.

On June 1 1977, the bodies of the four victims were discovered. Police authorities in Lafourche Parish ascertained that petitioner and his brother had been living with their father and that the Cadillac was missing. Accordingly, a nationwide bulletin was broadcast in an attempt to locate the Cadillac for investigation in connection with the homicides. As a result of an inquiry to that office on June 3, the San Bernadino County, California sheriff's office notified the Lafourche Parish Authorities of the whereabouts of petitioner and his brother in Victorville, California. Arrest warrants were then issued by the District Judge in Lafourche Parish to arrest them for auto theft. Petitioner and his brother were apprehended on June 3, 1977, and taken to a sheriff's office sub-station in Victorville, California.

Subsequent to their arrival at the police station, petitioner and his brother were interrogated regarding the car theft and the homicides. They allegedly gave a tape-recorded confession to the California authorities later that night. Then about midnight, on June 3, 1977, two Lafourche Parish deputies arrived at the Victorville police station. Sometime thereafter petitioner and his brother were interrogated by the Louisiana officers and subsequently gave another tape-recorded confession.

Upon their arrival in Louisiana, petitioner was indicted by a grand jury for four counts of first degree murder as a juvenile fifteen years of age charged with a capital offense. La. Const. Art. V, subsec. 19; La. Rev. Stat. 14:30; La. Rev. Stat. 13:1570 (A)(5).

On August 30, 31 and September 7, 1977, a hearing was held on a motion to suppress the two tape-recorded confessions and the evidence obtained therefrom. Then on December 29, 1977 the motion to suppress was overruled and dismissed by the trial court.

Consequently, on February 24, 1978, petitioner entered a plea of guilty to four separate counts of second degree murder. La. Rev. Stat. 14:30.1. The court subsequently sentenced petitioner to serve four consecutive life sentences in the custody of the Louisiana Department of Corrections. The pleas of guilty, however, were entered with specific reservation and approval of the court to appeal the Judgment of the court overruling and dismissing the motion to suppress. The right to appellant review of non-jurisdictional rulings is permissible under the exception of *State v. Crosby*, 338 So. 2d 584 (La. 1976).

II. Lower Court Proceedings

1. In July 1991, petitioner filed a Federal Habeas Corpus petition before the United States District Court for the Eastern

District of Louisiana, bearing cause No. 91-2711, Section G, and the same was dismissed without prejudice to allow for proper State Court exhaustion. Subsequent thereto, petitioner filed an Application for post-conviction relief in the Louisiana Supreme Court which was subsequently denied on September 19,1997, satisfying the requirement of exhaustion of remedies. *See* Appendix C.

2. April 24, 1997, a second petition for Writ of Habeas Corpus for purposes of complying with the recently imposed Statute of Limitations under Title U.S.C. section 2243, 2244, 2253, and 2254 (As amended April 24, 1996, P.L. 104-132, Title I, S 102, 110 Stat. 1217.) was filed in the United States District Court.

Subsequent thereto, the United States District Court adopted the Magistrate's findings of facts on November 12, 1997.

Motions for Certificate of Appealability and for Leave to proceed *In Forma Pauperis* were filed together with a memorandum in support. These motions were subsequently denied by the United States District Court on April 17, 1998.

5. The Fifth Circuit denied Petitioner's motion for relief in its Order dated October 27,1998.

REASONS FOR GRANTING THE WRIT

I. Petitioner's Confessions Were Not Freely Given And Were Not Knowingly And Intelligently Made in Violation of *Miranda v. Arizona.*

Petitioner's constitutional rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution were violated when (1) the trial court overruled and dismissed the motion to suppress his two tape-recorded confessions and the evidence obtained therefrom, and (2) the State of Louisiana

did not prove beyond a reasonable doubt in light of the totality of the circumstances, that petitioner's confessions were given freely and voluntarily with a knowing and intelligent waiver of his constitutional rights against self-incrimination and to the assistance of counsel.

Petitioner contends that in light of the totality of the circumstances and the testimony of the hearing on the motion to suppress, the record shows that the State did not prove beyond a reasonable doubt that petitioner's confessions were given freely and voluntarily with sufficient knowledge and understanding of his rights against self-incrimination and to the assistance of counsel. Moreover, the trial court and the Louisiana Supreme Court were in error for ruling that petitioner's two tape recorded confessions were "free and voluntary."

Moreover, the trial record is replete with facts and evidence which reveal the deceitful, coercive and psychological tactics which were employed by the California and Louisiana authorities in their efforts to compel petitioner and his brother to confess to four homicides. The facts and the officers' own testimony reveal these improper tactics utilized on the two young juveniles, who were held in the sole custody and control of the respective authorities for a total of thirteen long hours, beginning from 2:30 P.M., on through the night until three o'clock in the morning.

The testimony of the hearing on the motion to suppress (Hereinafter referred to as Sup. hrg.) reveals that on June 3, 1977, two California police officers, Detective Robert Woodrum and Charles Sodaro, went to petitioner's home at 2:30 P.M. and arrested him and his younger brother under the false pretext of an investigation for the theft of an automobile. It was later revealed however, that officers withheld from the juveniles and their mother the true and primary reason for the

arrest. The officers were then and there aware of the fact that the boys were wanted for questioning in Louisiana in connection with four homicides. Nevertheless, the police deceitfully told the juveniles and their mother that they were wanted for investigation of a simple auto theft charge. (Sup. hrg. p. 7, L. 11, 15; p. 35, L. 13; p. 36, L. 28; p. 37, L. 1, 4, 6; p. 239, L. 19; p. 240, L. 10-15).

Though the juveniles were being arrested on an auto theft charge, the officers took every precaution and secured the boys with handcuffs with hands behind their backs. Officer Woodrum's testimony supported this fact in that: "As soon as they were taken into custody they were secured with handcuffs and placed in our sheriff's detective unit." (*Id.*, p. 7, L. 24.). (*Id.*, p. 33, L. 15.).

The record reveals that officer Woodrum managed to read the Miranda rights to petitioner and his brother from a card while he was driving the police automobile. (*Id.*, p. 8, L. 17, 22-24; p. 93, L, 16-18; p. 313, L. 7-9.) The officer also stated that he read the Miranda rights "slow enough that it could be understood." (*Id.*, p. 68, L-16.).

Conversely, though officer Woodrum admitted that he did not explain to the 15-year-old petitioner what the meaning of the Miranda warnings were or of the consequences of waiving such rights other than simply reading the rights from the card. (*Id.*, p. 41, L. 19-25; p. 56, L. 22, 25.). In addition, these rights were never repeated to petitioner during any of the subsequent interrogations other than simply "reminding" petitioner of his rights. (Sup. hrg. p. 11, L. 15.).

The record is also devoid of any facts that would indicate any effort by the California officers to ascertain whether petitioner did in fact understand any of his constitutional rights or of the consequences of waiving such rights. The officer never inquired as to whether petitioner could read or write.

Testimony indicated that he could barely read or write. (*Id.*, p. 270, L. 2-5, L. 22-25.). Moreover, Psychiatrist, Dr. Robicheaux, determined that petitioner possessed the mental age of a child between the ages of seven and ten years old and that the petitioner was quite dull mentally.

When the officers and the juveniles arrived at the police sub-station, the boys were placed in separate interrogation rooms at which time the petitioner was handcuffed to a chair where he remained throughout the interrogations. (*Id.*, p. 41, L. 26-29; p. 314, L. 5.).

The first interrogation commenced about 3:00 P.M. The officer began to question petitioner concerning the possession of the automobile. (*Id.* p. 11, L. 25-31.). The police then informed petitioner that ". . . his dad had been shot in Louisiana." (*Id.* p. 13, L.4.). At this time, the record reveals that petitioners ". . . became very nervous. His hands began to tremble, and he was emotionally upset at that time." (*Id.* p. 13, L. 11-12.). As a result, the interrogation was terminated. (*Id.* p. 13, L. 14.). However, officer Woodrum later admitted that petitioner ". . . denied any involvement in the death of his father." (*Id.* p. 13, L. 21.).

Petitioner's version however, reveals that the officer began the interrogation by asking him about the automobile, firearms, and other matters when suddenly ". . . they told us that they were shot." (*Id.* p. 314, L. 28-31; p. 315, L. 1.). Moreover, petitioner repeatedly denied any involvement in the death of his father. (*Id.* p. 315, L. 4-5.). However, petitioner testified that he ask for an attorney, but the officer replied: ". . . okay. Let me ask you a couple more questions." (*Id.* p. 315, L. 6-8, L. 28; p. 314, L. 24; p. 334, L. 25-p.335, L. 14.). Petitioner stated that after he had requested an attorney, "Then they took me back and they put me in a cell." (*Id.* 315.). The first interrogation was terminated at about 3:30 or 3:40 P.M.

At the time the police were interrogating petitioner and his brother, their mother was present at the police station, but she was not permitted to see her sons or to be with them while the interrogation was being conducted. (*Id.* p. 19, L. 30-31; p. 62, L. 4-9; p. 257 L. 5-8.). Rather, she was told to "go home" and wait until she was called.(*Id.* p. 243, L. 8; p. 248, L. 12-13 - p.249 L. 1-5.). Officer Sodaro admitted that: "I would have told her that when we were through with the interview she could see them." (*Id.* p. 81, L. 6-14; p. 62, L. 2-9.). Moreover, Officer Woodrum also admitted that: "As a policy, as far as I'm concerned, I would probably interview them without her presence unless she requested to be there." (*Id.* p. 62, L. 4.) When asked "If possible, you do not want her there, is that correct?" the officer replied: "That's correct." (*Id.* 62, L. 7-9.)

Petitioner's mother was denied access to her sons and the police withheld from her the true nature and primary subject of the detention or arrest. Officer Woodrum would only reveal that her sons were being arrested "for investigation of the auto theft charges." (*Id.* p. 36, L. 28-p. 37, L. 1; p. 240, L. 10-15.) Officer Woodrum did not tell her that her sons "were suspects in a murder case." (*Id.* p. 37, L. 4-6.) Since she was not permitted to have access to the juveniles, she returned home as instructed by the police until she was called.

At about 8:00 P.M. petitioner asked to see officer Sodaro for the purpose of inquiring about his brother. Petitioner testified that he wanted "To talk to him, find out what Scotty said, and if I could see Scotty." (*Id.* p. 316, L. 29.) Petitioner testified that the same was not for the purpose of making any incriminating statements to the police. (*Id.* p. 316, L. 31 - p.317 L. 2.). He only wanted to "find out what Scotty — what was happening with Scotty." (*Id.* p. 317, L. 4.)

However, when petitioner was brought back in the interrogation room he was informed by officer Sodaro that his

brother had given a tape recorded confession. Petitioner was told by Officer Woodrum that , "Scotty told it right down the line." (*Id.* p. 18, L. 29.) The officer then played about "thirty seconds of the tape" so that petitioner could hear for himself that the officer was telling him the truth. This psychological ploy induced petitioner to give a tape recorded confession to his interrogators. The record indicates that the second interrogation lasted about thirty minutes (*Id.* p. 19, L. 18.) after petitioner had already been in police custody for five-and-a-half hours prior to the confession. (*Id.* p. 118, L. 22-29.)

After the police were successful in extracting the tape recorded confessions from petitioner and his brother, their mother was called and was allowed to see her sons. She arrived at the police station and was met there by officers Sodaro and Woodrum who informed her that the juveniles had confessed to four murders in Louisiana. (*Id.* p. 257, L. 20-31 and p. 258, L. 1.) She was then allowed to see her sons at about 10:00 P.M. (*Id.*)

At the same time petitioner's mother arrived at the police station the two officers were leaving to go to the airport to pick-up the Louisiana officers, Norman Diaz and Dennis Rodrique, who had arrived to take the juveniles back to Louisiana.

It should be noted at his point that the California officers knew before they had arrested petitioner and his brother that the Louisiana officers were due to arrive at the airport in 6 to 8 hours. It should also be noted that the California officers were working cooperatively with the Louisiana deputies in the investigation and interrogation of the juveniles. Moreover, it would be fair to assume that the California officers had given the Louisiana police a complete "rundown" of the details of the juveniles arrest and subsequent interrogations and resulting confessions.

Upon their arrival at the Victorville sub-station, the Louisiana officers immediately began interrogating the juveniles. Their interrogation was based in the same manner as before. The Louisiana officers likewise could not have assured themselves of whether the 15-year-old petitioner made a knowing and intelligent waiver of his constitutional rights to remain silent and to the assistance of counsel. Even still, the officers were able to extract yet another tape recorded confession from petitioner. This final interrogation ended about 3:00 A.M.

From the time of his initial arrest at 2:30 P.M. on June 3, 1977, to the termination of the final interrogation at 3:00 A.M. on June 4, 1977 petitioner had been under the sole custody and control of his interrogators. At no time within that 13-hour detention did the police make any attempt, as required by law, to release petitioner and his brother to the custody of the proper juvenile authorities or "Juvenile Hall." (Sup. hrg. p. 43, L. 18-27.) The statutory laws of California and Louisiana prohibit the detention of juveniles in any police station or similar facility unless a Judge of the juvenile court has authorized detention in such a place. (*See*, The California Welfare and Institutional Code, sub-sec. 216 (b), and the prior subsec. 515; Code section 507; La. Rev. Stat. 13:1577.) The reason given for this refusal to comply with the law, was because (as one officer admitted): "Because we wanted to interview them before they went to Juvenile Hall." (Sup. hrg. 43, L. 21-27.)

Moreover, the Louisiana officers were required by law to bring petitioner before a judge within 72-hours after his initial arrest for the purpose of appointment of counsel. *See*, LSA-C.Cr.P., art. 239.1 (A). This was never done by reason of the fact that the officers rented an automobile for the purpose of driving the petitioner to Louisiana from California.

II. Petitioner Should Have Been Afforded The Benefit of Retroactivity of Law Which Was Enunciated by The Louisiana State Supreme Court While His Petition For Review Was on Direct Appeal.

Petitioner's constitutional rights of Due Process and Equal Protection of the Law as guaranteed by the Fifth Amendment and Fourteenth Amendments to the United States Constitution were violated when the Louisiana Supreme Court refused to apply a "new rule" retroactive to petitioner's case when (1) the facts of the case that the Court used to announce the new rule and the facts involved in petitioner's case were very identical, (2) petitioner's case was pending on direct review at the same time when the Court announced the new rule, (3) the Louisiana Supreme Court, by selective application of newly announced rule, violated its basic norms of constitutional adjudication and the principles of treating similarly situated defendants the same, and (4) the issues involved in petitioner's case went to the very integrity of the fact-finding process.

On appeal before the Louisiana Supreme Court, [*See*, *State In Interest of Collum* 365 So. 2d 1272 (1979)], petitioner raised three assignments of error. One of the errors which is on issue here is that: "The Court erred in holding that a child of fifteen (15) years of age can waive his constitutional right against self incrimination unless the State could establish: (1) that the juvenile actually consulted with an attorney or an adult for the waiver; (2) that the attorney or adult consulted was interested in the welfare of the juvenile; and or (3) that the adult other than an attorney who was consulted was fully advised of the rights of the juvenile." (Original Brief filed on behalf of defendant, p. 3.)

While petitioner's appeal was pending before the Louisiana Supreme Court (hereinafter referred to as "the

Court"), the Court was confronted and had decided an identical issue concerning the waiver of constitutional right against self-incrimination by juveniles in *State In Interest of Dino,* 359 So. 2d 586 (La. 1978), decided on June 15, 1978. In that case, the Court unequivocally determined that, ". . . The purported waiver by a juvenile must be adjudged ineffective upon the failure by the State to establish any of the three prerequisites to waiver, *i.e.*, that the juvenile actually consulted with an attorney or an adult before waiver, that the attorney or adult consulted was interested in the welfare of the juvenile or that, if an adult other than a attorney was consulted, the adult was fully advised of the rights of the juvenile."

The issues in the *Dino* case are all but identical to those before this Honorable Court on behalf of your petitioner. In *Dino,* the record established that Dino's mother was also present at the police station during the interrogation. However, the State did not show that Mrs. Dino was fully advised of her juvenile son's rights or that she consulted with him prior to his waiver of rights. Similarly, petitioner's mother, who was interested in her son's welfare, was present at t he police station during the commencement of the first interrogation (Sup. hrg. p. 234), but she was not permitted to see her son or to be with him during the interrogation. (*Id.* p. 19, L. 30-31; p. 62, L. 4-9; p. 257, L. 5-8.) Instead, she was told by the police to go home (*Id.* p. 243, L. 8; p. 248, L. 12-13 p. 249, L. 1-5.) until they "were through with the interview" (*Id.* p. 81, L. 6-14; p. 62, L. 2-9.) because the police did not want her to be present during the interrogation. (*Id.* p. 62, L 4, 7-9.). Thus, as in *Dino,* the State did not show that petitioner's mother was fully advised of her juvenile son's charges and constitutional rights or that petitioner was allowed to consult with her in waiving his rights.

Although the issues in petitioner's case were very identical to the issues presented in the *Dino* case, the Louisiana Supreme Court nevertheless refused to apply the new rule announced in

Dino retroactive to petitioner's case. The Court's reasoning for refusing to give *Dino* retroactive application are threefold. One, the Court stated that the new rule announced in *Dino* did **not** go to the very integrity of the fact-finding process.

Petitioner contends that the 4-3 majority opinion of the Court erred when it held that the new rule of *Dino* does not go to the integrity of the fact-finding process. Rather, a confession or any evidence which is obtained by the police to prove the State's case against an accused is an integral part of the fact-finding process. Moreover, when a confession is admitted into evidence it has such a persuasive effect upon the trier of facts as to substantially determine the outcome of the fact-finding process. Consequently, the determination of guilt or innocence is usually always predetermined at the time the confession is initially obtained. *See* Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. Chi. L. Rev. 313, 325 (1964). Also see the Court's own holding in *State v. Glover,* 343 So. 2d 118, 129 (1977). The Louisiana Supreme Court expressed in *Dino* three reasons why juveniles should not be allowed to waive their constitutional rights. In addition to the fact of assuring that the waiver itself is knowing, intelligent and voluntary, the Court set forth two other reasons which relate to the voluntariness of a juvenile's confession, as well as to the waiver of rights. The Court stated that "if the juvenile decides to talk to his interrogators, the assistance of an adult can mitigate the dangers of untrustworthiness" and "the likelihood that the police will practice coercion;" and that "the presence of such an adult can also help to guarantee that the accused gives a fully accurate statement and that the statement is rightly reported by the prosecution at trial." *See*, *State In Interest of Dino,* 359 So. 2d 586 at 592. It is evident, therefore, that the *Dino* rule does go to the very integrity of the fact-finding process.

The second reason for the Court's refusal to give the *Dino* rule retroactive application was that: "The major design of the new rule announced in Dino, even if it were to overcome an aspect of the criminal trial that substantially impairs its truth-finding function, is not violated in this case where there was no trial and the accused has pled guilty."

It is the contention of your petitioner that regardless of whether his conviction was obtained pursuant to a jury trial, judge trial or guilty plea adjudication, the confessions were used by the trier of fact or judge in its determination of the fact-finding process of petitioner's guilty plea adjudication. It is for this reason that the Louisiana Supreme Court was in error for stating that the "truth-finding function is not violated in this case where there was no trial and the accused has plead guilty."

The third reason that the Court gave for refusing to apply the *Dino* rule retroactively to petitioner's case was the following: "Consequently, although an additional safeguard was announced in *Dino,* an accused whose case was being tried or on appeal on the effective date of *Dino* was nevertheless not deprived of asserting the same claim of involuntariness under the totality of circumstances test. In the case at bar no evidence has been excluded and no question of the voluntariness or accuracy of the guilty plea is urged. Only the validity of defendant's confession is argued. The very integrity of the fact-finding process is unaffected."

Petitioner contends that the Court was in error by stating that petitioner did not "assert the same claim of involuntariness under the totality of circumstances test."

Nevertheless, in determining the retroactivity application of the Dino rule the Court did recognize that the applicability of the issue of retroactivity to cases on direct appeal at the time of the *Dino* decision was "squarely presented" in petitioner's case. The Court then went on and utilized the so-called

three-pronged analysis of *Johnson v. New Jersey*, 384 U.S. 719 1966) to determine whether to apply *Dino* retroactively.

The three criteria which were required in *Johnson v. New Jersey*, *supra* for deciding the issue of retroactivity were: (1) the purpose of the new rule; (2) the reliance which may have been placed upon prior decisions on the subject; and (3) the effect on the administration of justice of a retroactive application. The Court then stated "that the balancing process of the criteria applied in *Johnson v. New Jersey* would be explored only where a newly announced rule does not go to the very integrity of the fact-finding process. Where the integrity of the fact-finding process is impaired, retroactivity would be imposed."

Petitioner maintains that under the three-pronged analysis of *Johnson v. New Jersey*, the *Dino* rule should have been applied retroactive to his case.

The Louisiana Supreme Court held that, "the purpose of the new rule announced in *Dino* purports to assure that a juvenile answering questions at a custodial interrogation does so with an intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing that right." The Court further held that, "The purpose of *Dino* is two-fold: to protect the juvenile's right against self-incrimination and his right to counsel." Moreover, the Court stated that, "This is the same purpose that the older voluntariness standard and the prophylactic Miranda rule served." The purpose of the *Dino* rule also seeks to insure trustworthiness, voluntariness, and an accurate reporting of juvenile confessions which is vitally concerned with the ultimate fact of guilt or innocence and the process by which it is determined.

Therefore, since the major function to be served by the *Dino* rule was the prevention of unfair determinations of guilt

based on improvident or untrustworthy juvenile confessions, it is clear that *Dino* should have been given complete retroactive effect. Moreover, it is clear that the purpose of the *Dino* rule was to overcome an aspect of the judicial process which impairs its fact-finding function.

The second criteria of *Johnson v. New Jersey* which is "the extent of the reliance by law enforcement authorities on the old standards" was insignificant in the *Dino* decision because most enlighten law-enforcement agencies had already adopted the practice formally mandated by Dino. *See*, *State In Interest of Dino*, 359 So. 2d 586 at 592-93 (La. 1978); Comment, *Louisiana's Youth Law: Rules and Practice,* 35 La. L. Rev. 851, 856 (1975). Moreover, the Louisiana Supreme Court noted in the case of *State v. Ross*, 343 So. 2d 722, 729 (1977), that in proceedings against juveniles, most investigating officers took the precaution of allowing a juvenile to confer with a family member before waiver of his rights, and commended the procedure. As early as 1948, the United States Supreme Court recognized that a juvenile's isolation from any friendly adult prior to police interrogation raised serious questions concerning voluntariness. *See*, *Haley v. Ohio,* 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed 224 (1948); *Gallegros v. Colorado,* 370 U.S. 49, 62 S. Ct. 1209, 8 L.Ed 2d 325 (1962).

The *Dino* rule was not the type of "new rule" that set new precedent for law enforcement officials in Louisiana. *Dino* did not create a new and unanticipated principle of law which overturn a longstanding and widespread practice to which the Courts of Louisiana had not spoken of. The *Dino* rule was likened to that of the longstanding prophylactic Miranda Rule. It is for this reason that the second criteria of *Johnson v. New Jersey* was not affected by the *Dino* decision.

For the foregoing reasons, petitioner maintains that he has met the burden of showing that the three-pronged test of

Johnson v. New Jersey had been overcome and that the Court should have retroactively applied the *Dino* rule. Moreover, the Court should have applied *Dino* retroactive to his case because the facts in both cases deal with identical issues both of which affect the integrity of the fact-finding process.

Petitioner also contends that the Louisiana Supreme Court, by refusing to apply the *Dino* rule retroactive to his case, has violated the basic norms of constitutional adjudication by failing to treat similar factual cases the same. Given the fact that *Dino* and *Collum* (*see*, *supra*) presented identical issues, the cases should have been regarded the same by the Louisiana Supreme Court. It is fundamentally unfair to select "a case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule." *See Mackey v. United States*, (1971) 401 U.S. 667 at 678 679, 91 S.Ct. L160 at 1172-1173 (Harlan, J., dissenting).

At the time in which petitioner's case was pending on direct appeal before the Louisiana Supreme Court, the Court recognized yet another situation when it issued an order of remand for action consistent with the principles announced in *Dino* in the case of *State In Interest of Leander Jones,* 360 So. 2d 1181 (1978). However, when presented with petitioner's case the Court failed to reach the same conclusion as it had in *Dino* and *Leander Jones*. This practice of selective application of new rules violates the principle of treating similarly situated defendants the same. *See*, *Desist v. United States,* 394 U.S. 244 at 258-259, 89 S. Ct. 1030 at 1038-1039, 22 L.Ed 2d 248 (1969)(Harlan, J., dissenting).

It is for these reasons that Petitioner prays for Writ of Certiorari to issue from this Court to review the record of the Louisiana Supreme Court and its refusal to apply the *Dino* rule

retroactively to his case. Petitioner further prays that this Court will adopt the position as that of the Dissenting members of the Louisiana Supreme Court who were correct in their position to apply the *Dino* rule retroactive to petitioner's case.

III. Retroactivity: Then And Now

Griffith v. Kentucky, and *Teague v. Lane*

In addition to the previous issues and authorities presented within this petition for Writ of Certiorari, petitioner prays that this Honorable Court will consider and adopt the Honorable Justice Harlan's views of the issues of retroactivity which were expressed in the dissenting opinion in *Mackey v. United States, supra*, citing *Desist v. United States, supra*, and which were later adopted by the majority of the members of this United States Supreme Court in *United States v. Johnson,* 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed 2d 202 (1982) and *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708,93 L.Ed 2d 649 (1987).The questions petitioner urges here are twofold: (1) whether the retroactivity principle in *Griffith v. Kentucky, supra*, constitute a "new rule" for retroactivity purposes; and (2) whether the *Griffith* principle should be given retroactive effect to petitioner's entitlement of the new rule subsequently decided in *State in the Interest of Dino, supra.*

"First, it must be determined whether the decision relied upon announced a new rule." *Stringer v. Black*, 503 U.S. 222, 228, 112 S.Ct. 1130, 1135, 117 L.Ed 2d (1992). In an attempt to define a new rule, the Court in *Teague v. Lane*, 489 U.S. 299, 109 S.Ct. 1060, 103 L.Ed 2d 334 (1989), explained that:

> . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the State or the Federal Government.(Citation omitted) To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Id., at 301, 109 S.Ct. at 1070. (emphasis in original). Following *Teague*, the Court went on to define "new rule" in much broader terms. *See, e.g., Sawyer v. Smith*, 497 U.S. 227, 234, 110 S. Ct. 2822, 2827, 111 L.Ed 2d 193 (1990) (legal question "over which reasonable jurists might disagree"); *Butler v. McKellar*, 494 U.S. 407, 415, 110 S. Ct. 1212, 1217, 108 L.Ed 2d 347 (1990) (rules "susceptible to debate among reasonable minds"); *Saffle v. Parks*, 494 U.S. 484, 488, 110 S. Ct. 1257, 1260, 108 L.Ed 2d 415 (1990) (rule is new unless a court "would have felt compelled by existing precedent to conclude that the rule [petitioner] seeks was required by the Constitution").

The "rule" petitioner seeks here is the retroactivity principle in *Griffith v. Kentucky*, *supra*, in which the Court held that "a new rule . . . is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.*, 479 U.S. at 328, 107 S.Ct. at 716. The retroactive application of the *Griffith* principle would control the retroactivity of the new rule in *State in the Interest of Dino*, *supra*. Petitioner sought the benefit of *Dino* when his case was pending on direct review. *State In Interest of Collum*, 365 So. 2d. at 1274-75 ("the issue of the retroactivity of the *Dino* decision, or at least its applicability to cases on direct appeal at the time of the decision, is squarely presented").

In order for petitioner to receive the benefit of the *Griffith* principle he must first survive the retroactivity test in *Teague v. Lane*, *supra*. Under the *Teague* Standard "new rules" generally will not be applied retroactively on post-conviction/habeas corpus review of cases which have become final before the new rules are announced. However, under the *Teague* doctrine the Court can still retroactively apply new rules to final convictions if the new rule would: (1) place certain kinds of primary, private individual conduct beyond the

power of the criminal law-making authority to proscribe; or (2) require the observance of those procedures that are implicit in the concept of ordered liberty. *Id*, 489 U.S. at 307, 109 S.Ct. at 1073-74.

Petitioner submits that the second *Teague* requirement applies here because the *Griffith* Court was concerned with observing fundamental principles essential to the fairness in the administration of justice in the area of retroactivity. On the other hand, the *Griffith* principle of applying new rules to similar cases on direct review enfolds basic principles of constitutional adjudication which derive from a long history of its own. In each aspect, the second *Teague* exception requires retroactive application of *Griffith v. Kentucky.* Initially however, the history of the fundamental principles embraced in *Griffith* should be explored in order to appreciate its effectiveness in the administration of justice.

The principle of applying new rules to similar cases on direct review has its roots in the American Justice System, in both civil and criminal litigation. '[F]or nearly a thousand years,' the "fundamental rule . . . that has governed '[j]udicial decisions,'is that such decisions must ordinarily "be given full retroactive effect in all cases still on direct review and as to all events, regardless of whether such events predate or post [the court's] announcement of the rule." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86,113 S.Ct. 2510, 2516-17, 125 L.Ed 2d 74 (1993) (quoting *Kuhn v. Fairmont Coal Co*, 215 U.S. 349, 372, 30 S.Ct. 140, 148, 54 LED. 228 (1910) (second alteration in original). Even under the three-pronged standard in *Linkletter v. Walker*, 381 U.S. 618; 85 S.Ct.1731; 14 L.Ed 2d. 601(1965),the Court embraces the basic principle that "a change in law will be given effect while a case is on direct review." 381 U.S. 618, 627, 85 S.Ct. 1731, 1736, 14 L.Ed 2d 601 (1965). *See also Tehan v. United States ex rel. Shott*, 382 U.S. 406, 409, n.3, 86 S.Ct. 459, 461, n.3, 15, L.Ed 2d 453

(1966) (still no "question of applicability of the *Griffin* rule to cases still pending on direct review at the time it was announced").

However, in *Johnson v. New Jersey*, 384 U.S. 719, 732, 86 S.Ct. 1772, 1780, 16 L.Ed 2d 882 (1966), and *Stovall v. Denno*, 388, U.S. 293, 300, 87 S.Ct. 1967, 1971, 18 L.Ed 2d 1199 (1967), the Court departed from that basic principle. Those cases held that the *Linkletter* three-pronged analysis applied both to convictions that were final and to convictions pending on direct review. *Ibid.* Following *Stovall* all newly declared rules were determined under the three-part test. Although Members of the Court continued to assert that new rules must be applied to cases pending on direct review, their pleas fell on deaf ears. *See United States v. Johnson*, 457 U.S. at 545, 102 S. Ct. at 2584; *Griffith v. Kentucky*, 479 U.S. at 322, 107 S. Ct at 712. The departure from that basic principle, subsequently, played havoc with the administration of justice.

Fifteen years later in *United States v. Johnson*, *supra*, the Court finally awakened from a nightmare of "incompatible rules and inconsistent principles," 457 U.S. at 546, 102 S. Ct. at 2585, left in the wake of its decisions under the *Linkletter/Stovall* three-pronged analysis. As the Court in *Teague v. Lane*, *supra*, pointed out:

> The *Linkletter* retroactivity standard has not led to consistent results. Instead, it has been used to limit application of certain new rules to cases on direct review, other new rules only to the defendants in the cases announcing such rules, and still other new rules to cases in which trials have not yet commenced. . . .

Application of the *Linkletter* standard led to the disparate treatment of similarly situated defendants on direct review. *Ibid.*, 489 U. S. at 302-03. "This inequity also generated vehement criticism." *Ibid.*, at 303. The Court "rejected as

unprincipled and inequitable the *Linkletter* standard for cases pending on direct review at the time a new rule is announced." *Teague*, 489 U.S. at 304.

Consequently, the Court's conscience was compelled by the Spirit of the Constitution to repair the damage done to the foundation and integrity of the administration of justice. The Court acknowledged that the problem was caused from its departure from the basic principle that "a change in law will be given effect while a case is on direct review." *Linkletter*, *supra*, 381 U. S. at 627, 85 S.Ct. at 1736. Forthrightly the Court in *United States v. Johnson*, *supra*, had to admit "that *Linkletter* was right in insisting that all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this court at the time the 'new' decision is handed down." *Id.*, 457 U.S. at 548, 102 S. Ct. at 2586 (quoting *Desist v. United States*, 394 U. S. 244, 258, 89 S. Ct. 1030, 1039, 22 L.Ed 2d 248 (1969)). The *Griffith* court further admitted that its "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication," 479 U.S. at 322, 107 S.Ct. at 713, for "the integrity of judicial review" requires the application of the new rule to "all similar cases pending on direct review," *Id.* at 323, 107 S. Ct. at 713, because the "selective application of new rules violates the principle of treating similarly situated defendants the same." *Ibid. See also United States v. Johnson*, 457 U.S. at 547, 102 S.Ct. at 2585-86 ("the Court's selective application of new constitutional rules departed from the principle of treating similarly situated defendants similarly"). The Court explained that the problem of not applying new rules to cases pending on direct review is "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a new rule. *United States v. Johnson*, 457 U. S. at 556, n.16, 102 S.Ct. at 2590, n.16 (emphasis in original).

See also Griffith, supra, 479 U.S. at 323, 107 S.Ct. at 713. Thus, the principle of applying new rules to cases pending on direct review and the principle of treating similarly situated defendants similarly , served to repair the structural defect in the administration of justice. Those fundamental principles were indispensable to the basic norms — and integrity — of constitutional adjudication.

In *United States vs. Johnson*, the Court outlined three purposes served by embracing those basic principles:

> First, retroactive application of [new rules] to all previously nonfinal convictions would provide a principle of decision making consonant with our original understanding of retroactivity in *Linkletter* and *Shott*. . . .
>
> Second, application of [new rules] to cases pending on direct review would comport with our judicial responsibilities "to do justice to each litigant on the merits of his own case," and to "resolve all cases before us on direct review in light of our best understanding of governing constitutional principles." . . .
>
> Third, application of [new rules to cases pending on direct review] would further the goal of treating similarly situated defendants similarly. . . .

Id., 457 U. S. at 554-55, 102 S.Ct. at 2590 (quote in original) (citations omitted). To do justice to all similarly situated defendants on direct review was the Court's foremost concern in *United States v. Johnson* and *Griffith v. Kentucky*.

It has long been axiomatic that due process of law requires the courts "to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U. S. 219, 236, 62 S.Ct. 280, 290, (1941). The Constitution itself "essentially" requires states to treat "all persons similarly

situated" alike. *See e.g., City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed 2d 313 (1985). Those basic principles are embraced in Article I, Sections 2,3, and 22 of the 1974 Louisiana Constitution. The *Griffith* principle of applying new rules to all similarly situated defendants on direct review is essentially "the kind of absolute prerequisite to fundamental fairness that is 'implicit in the concept of ordered liberty.'" *Teague*, *supra*, 489, U. S. at 314, and is the kind of 'bedrock . . . element' that would be retroactively applied under the second exception [the Court] have articulated" in *Teague*. *Id.*, at 315 .

The strong and emotional language in *United States v. Johnson* and *Griffith v. Kentucky* left no doubt that its decision, and the principles embraced by it, was compelled by the Constitution. "[O]ur duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was." *Mackey v. United States*, 401 U. S. 667, 681, 91 S. Ct. 1160, 1174, 28 L.Ed 2d 404 (1971); *United States v. Johnson*, 457 U. S. at 548, 102 S.Ct. at 2586. "[A]pplying the Constitution" and the "law" entails observance to the "basic norms of constitutional adjudication," the principle that "a change in law will be given effect while a case is on direct review", and the "principle of treating similarly situated defendants the same." The Court's sole concern was with the mandates of the Constitution - not with the application of a new rule of criminal procedure which effects the trial and sentencing process. "[T]he principle that this Court does not disregard current law, when it adjudicates a case pending before it on direct review, applies regardless of the specific characteristics of the particular new rule announced." *See Griffith, supra*, 479 U. S. at 326, 107 S.Ct. at 715. The Court in *Griffith* did not create, anew, rules of constitutional adjudication; instead, the Court admitted to have

disregarded those basic principles that the Constitution conceived from our Fore Fathers. The Court pointed out its judicial responsibility under the Constitution:

> "If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all . . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that has not already run the full course of appellate review is quite simply an assertion that our constitutional function is not one of the adjudication but in effect of legislation."

Griffith, 479 U. S. at 323, 107 S.Ct. at 713 (quoting *Mackey v. United States*, 401 U. S. at 679, 91 S.Ct. at 1173). Thus, under *Saffle v. Parks*, *supra*, the *Griffith* principles would require retroactive effect because the Court "felt compelled by existing precedent to conclude that the rule [petitioner] seeks was required by the Constitution." *Saffle*, 494 U. S. at 488, 110 S.Ct. at 1260.

Petitioner further submits that the retroactivity principle in *Griffith v. Kentucky*, *supra*, obviously overruled the three-pronged *Linkletter/ Stovall* standard for cases pending on direct review and, thus, would constitute a "clear break" with that standard. However, *Griffith* held that new rules must be applied retroactively to all cases on direct review "with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.*, 479 U. S. at 328, 107 S.Ct. at 716. If assuming the *Griffith* principle constitutes a "new" rule, then *Griffith* itself applies retroactively with "no clear break exception" with past standards. This rational was explained by the *Griffith* Court:

> "The fact that the new rule may constitute a clear break with the past has no bearing on the 'actual

> inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule."

Id., 479 U. S. at 327-28, 107 S.Ct. at 716 (inside quote: *United States v. Johnson*, 457 U. S. at 556, n.16, 102 S.Ct. at 2590, n.16). "[T]he use of a 'clear break' exception creates the same problem of not treating similarly situated defendants the same." *Griffith*, 479 U. S. at 327, 107 S.Ct. at 715. Thus, the *Griffith* principle controls the retroactive application of all new rules to similar cases or direct review, regardless of whether such new rules predate or postdate the *Griffith* decision.

Petitioner urges this Court to take the same position as that of the United States Supreme Court and various federal Circuit Courts that have applied the *Griffith* principle to cases on post-conviction/habeas corpus review. The following cases sought the benefit of a new rule that was rendered while their case was on direct review, but predating the *Griffith* decision. *See*, *e.g.*, *Perry v. Lynaugh*, 492 U. S. 302, 315, 109 S.Ct. 2934, 2944, 106 L.Ed 2d. 256 (1989); *Hill v. Maloney*, 927 F.2d. 646, 648, n.2 (1st Cir. 1990); *Wiley v. Puckett*, 969 F.2d. 86, 101 (5th Cir. 1992); *Hamilton v. Jones*, 907 F.2d 807, 808 (8th Cir. 1990); *Liles v. Saffle*, 945 F.2d. 333, 335, n.2 (10th Cir. 1991), *cert. denied* 502 U. S. 1066, 112 S.Ct. 956, 117 L. Ed. 2d 123 (1992); *Pitts v. Cook*, 923 F.2d. 1568, 1571, n.3 (11th Cir. 1991). Those cases applied the *Griffith* principle without questioning whether *Griffith* announced a new rule or constituted a 'clear break' with the past.

Petitioner reminds the Court that he experienced, on direct appeal, the same of selective application of a new rule that *Griffith* condemned as violating the principle of treating similarly situated defendants similarly. For instance, *Dino* was first chosen as "the chance beneficiary" of the new rule announced in his case. Thereafter, another juvenile came along

and benefitted from the *Dino* rule in the case of *State in the Interest of Leander Jones*, 360 So. 2d 1181 (1978). In that case, the Court issued an order of remand for action consistent with the *Dino* rule. But when petitioner came before the Court seeking the same benefit, the Court declined to apply *Dino* to his case. The *Griffith* Court recognized such inequitable treatment:

> [I]t is the nature of judicial review that precludes us from "[s]imply fishing one case from the stream of appellant review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule."

Id., 479 U. S. at 323, 107 S.Ct. at 713 (quote in original) (citation omitted). *United States v. Johnson*, *supra*, condemned the selective application of new rules because of "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a new rule. *Id.*, 457 U. S. at 556, n.16, 102 S.Ct. at 2590, n.16 (emphasis in original); *See also Griffith*, *supra*, 479 U. S. at 323, 107 S. Ct. at 713. When this Court gave Dino and Leander Jones the benefit of a new rule, but denied petitioner the same, the Court violated petitioner's right to due process of law and equal treatment under Article I, Sections 2, 3 and 22 of the 1974 Louisiana Constitution. Section 22 provides:

> "All Courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."

Petitioner did not receive Due Process of law and Justice before this Court on direct appeal. The standard used by the Court to deny petitioner the benefit of the *Dino* rule was condemned by

the High Court as not providing justice and equal treatment to similarly situated defendants on direct review. This Court should not respect and give precedent to the "rejected, unprincipled and inequitable" *Linkletter/ Stovall* Standard in its reconsideration to apply the *Dino* rule to petitioner's case. The United States and Louisiana Constitutions, and the fundamental principles embraced in *Griffith v. Kentucky* should be the only prevailing authority at the time of the petitioner's direct appeal to guide this Court's decision making process.

CONCLUSION

Throughout this petition for Writ of Certiorari it has been the attempt of your petitioner to demonstrate his desperate need for the imposition of justice at every level which has been lacking since his arrest in 1977. State exhaustion has been to no avail and the progeny of *Teague* continues even today in such cases as *Lambrix v. Singletary,* 520 U.S. —, (slip op.,at 8), *Graham v. Collins,* 506 U.S. 461, 467 (1993) and more recently this Court's ruling in the case of *O'Dell v. Netherland, Warden, et al.*, 96-6867 which was decided June 19,1997.

The "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of criminal proceedings" (*Graham*, *supra,* at 478 quoting *Teague*, 489 U.S. at 311) would seem to demand that the liferaft of justice be hurled to petitioner Donnie Collum who after twenty-one years has yet to be removed from the cold waters of injustice. From the age of fifteen until thirty-seven it is respectfully prayed that this Writ will issue and at last be "just in time."

Petitioner urges this Court to be mindful that Justices Tate, Dixon, and Dennis, of the Louisiana Supreme Court would have given petitioner the retroactive benefit of the *Dino* rule. *See State In Interest of Collum*, 365 So. 2d at 1290 (1979), also, the late Justice Thurgood Marshall would have granted

Certiorari. *See Collum v. Louisiana,* 444 U.S. 882, 100 S.Ct. 171, 62 L.Ed 2d 111 (1979). *See also* Appendix D.

For the foregoing reasons the Petition for Writ of Certiorari should issue.

Respectfully submitted,

DAVID W. HUTTON, JR.
Counsel of Record
115 West Madison St
Courthouse Square
Pulaski, TN 38478
(931) 363-6545

ANDRE LA PLACE
2762 Continental Drive Suite 103
Baton Rouge, LA 70808

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 98-30264

DONNIE FRANKLIN COLLUM,
Applicant-Appellant,

versus

BURL CAIN. Warden, Louisiana State Penitentiary;
RICHARD IEYOUB, Attorney General, State of Louisiana,
Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

FILED
SEP 14 1998
CHARLES R. FULBRUGE III
CLERK

ORDER:

Donnie Franklin Collum (#88439), a state prisoner, has given notice of his appeal from the district court's order dismissing his application for a writ of habeas corpus. Before Collum may proceed with his appeal, he must obtain a certificate of appealability ("COA") from a judge of this court. *See* 28 U.S.C. § 2253(c)(1)(A). COA will be granted only if Collum makes a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Collum contends that his waiver of his constitutional rights against self-incrimination and to assistance of counsel prior to giving his confession was not knowing and voluntary, and that

his right to due process was denied when the state courts refused to apply the rule in *State ex rel. v. Dino*, 359 So. 2d 586 (La. 1978), retroactively. Collum has failed to make a substantial showing of the denial of a constitutional right, and therefore, COA is DENIED as to these issues.

Collum's request for leave to proceed in forma pauperis on appeals is also DENIED.

/s/ Emilio M. Garza
EMILIO M. GARZA
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 98-30264

DONNIE FRANKLIN COLLUM,
Petitioner-Appellant,

versus

BURL CAIN. Warden, Louisiana State Penitentiary;
RICHARD IEYOUB, Attorney General, State of Louisiana,
Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

FILED
OCT 27 1998
CHARLES R. FULBRUGE III
CLERK

Before EMILIO M. GARZA, DeMOSS, and BENAVIDES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the appellant's motion for leave to file a motion for reconsideration out of time is GRANTED.

A member of this panel has previously denied a certificate of appealability. After consideration by this panel upon request of appellant, IT IS ORDERED that appellant's motion for reconsideration is denied.

APPENDIX C

The Supreme Court of the State of Louisiana

No, 97-KP-1057

DONNIE COLLUM

vs.

JOHN WHITLEY, WARDEN
LOUISIANA STATE PENITENTIARY

IN RE: Collum, Donnie; — Plaintiff(s); Applying for Supervisory and/or Remedial Writ; Parish of Lafourche 17th Judicial District Court Div. "D" Number 78836.

September 19, 1997

Denied.

CDK
PFC
WFM
HTL
BJJ
CDT
JTK

VICTORY, J. not on panel.

Supreme Court of Louisiana
September 19, 1997

/s/ [signature illegible]
Clerk of Court
For the Court

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 1, 1979

Ferdinand C. Kleppner, Esq.
Grisbaum & Kleppner
3224 N. Trunball Drive
Metairie, LA 70002

RE: Donnie Franklin Collum v. Louisiana
No. 78-1715

Dear Mr. Kleppner:

The Court today entered the following order in the above-entitled case:

The petition for writ of certiorari is denied. Mr. Justice Marshall would grant certiorari.

Very truly yours,

Michael Rodak, Jr., Clerk

/s/ Michael Rodak, Jr.

No. 98-1186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DONNIE F. COLLUM,

Petitioner,

vs.

NEIL BURL CAIN, Warden
Louisiana State Penitentiary,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD P. IEYOUB
Attorney General
State of Louisiana

WALTER K. NAQUIN, JR.
Counsel of Record
District Attorney
17th Judicial District
Parish of Lafourche
Post Office Box 431
Thibodaux, Louisiana 70302
(504) 447-2003

Attorneys for Respondent

151275

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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The State of Louisiana, respondent herein, prays that this Honorable Court deny the issuance of a Writ of Certiorari to review the judgment and decision of the Supreme Court of the State of Louisiana and the United States Court of Appeals for the Fifth Circuit affirming the convictions and upholding the validity of the guilty pleas of Donnie Franklin Collum for four (4) counts of second degree murder in the Seventeenth Judicial District Court, Lafourche Parish, State of Louisiana and denying petitioner's motion for Certificate of Appealability.

STATEMENT OF FACTS

On May 27, 1977, Jessie Collum, his wife, Lenora, and their children, Jeffrey, age 9, and Anna, age 6, were killed in the Collum trailer home located in the Four Point Heights subdivision, Lafourche Parish, Raceland, Louisiana. All of these individuals had been shot several times, and Jessie Collum had also been stabbed. Two days later on May 29, 1977, Donnie Collum, age 15, and Scotty Collum, age 14, the sons of Jessie Collum by a prior marriage, were stopped by police authorities in Benson, Arizona. Both brothers admitted to the Benson, Arizona authorities that they had taken the automobile without the knowledge or permission of Jessie Collum. As a result, the vehicle was left in Arizona, and the authorities returned Donnie Collum and Scotty Collum to their mother, Mrs. Peggy Mendoza, who lived in Victorville, County of San Bernadino, California.

On Wednesday, June 1, 1977, the bodies of the Collum family were discovered. On this same date the Lafourche Parish Sheriff's Office sent out nationwide bulletins for the location of the Cadillac automobile, and also sought information concerning the whereabouts of Donnie Collum and Scotty Collum. On June 3, 1977, the San Bernadino County Sheriff's Office notified the Lafourche Parish Sheriff's Office of the

location of both Donnie and Scotty Collum. They further advised that the Cadillac automobile was in Benson, Arizona and that both brothers had admitted taking the automobile without the knowledge or permission of Jessie Collum.

At approximately 4:30 p.m. Central time (2:30 p.m. Pacific time), warrants were issued in Lafourche Parish, 17th Judicial District Court, State of Louisiana for the arrest of Donnie Collum and Scotty Collum for the theft of the 1974 Cadillac. The affidavits supporting these warrants were filed into evidence in these proceedings. The information concerning the arrest warrants was telephoned from Lafourche Parish to the San Bernadino County Sheriff's Office. Sergeant Charles Sodaro, Detective Robert Woodrum, and Detective Dennis Searcy responded to this information and proceeded to the trailer park where Donnie and Scotty Collum were then apprehended. Mrs. Peggy Mendoza, the mother of Donnie and Scotty Collum, was present at the time of the arrest. She was advised that they were being taken into custody for Louisiana authorities on the basis of a warrant for auto theft. Detective Woodrum read the *Miranda* warnings to both Donnie and Scotty Collum from a *Miranda* card that he carried on his person. Both brothers advised that they understood their rights. Neither of the two appeared to be under the influence of alcohol or drugs at this time. When they arrived at the Victorville Sheriff's Office sub-station they were placed in separate interview rooms.

At approximately 3:00 p.m. on June 3, 1977, Detective Sodaro and Woodrum interviewed Donnie Collum. During this interview, the petitioner admitted the car theft. He was reminded of his *Miranda* rights a second time and then told that his father had been shot to death. At this time he became very nervous. The interview was therefore terminated at approximately 3:30 p.m.

At approximately 8:00 p.m. on June 3, 1977, Sergeant Sodaro and Detective Woodrum again spoke to Donnie Collum as a result of Donnie's request to speak to them. Prior to this conversation, he was again reminded of his *Miranda* rights, and he indicated that he understood; Donnie Collum consented to talk to the officers. At his request, he was permitted to hear a small portion of the taped statement that Scotty Collum had previously given to the officers. At 8:11 p.m. Donnie Collum commenced a taped statement which was concluded at 8:40 p.m. The taped statements of Donnie Collum have been filed into evidence in these proceedings.

Later that night Major Norman Diaz and Detective Dennis Rodrigue of the Lafourche Parish Sheriff's office arrived in Victorville, California. They proceeded immediately to the detention center where Major Diaz spoke with Mrs. Mendoza. Major Diaz and Detective Rodrigue then proceeded to interview both Donnie and Scotty Collum. These interviews were also taped, and have also been offered into evidence in these proceedings. On July 18, 1977, a Motion to Suppress the taped statements was filed by the petitioner herein, and this matter was heard on August 30, 31, and September 7, 1977. On December 29, 1977, the Motion to Suppress filed by the petitioner was overruled and dismissed. Subsequently, on February 24, 1978, the petitioner, Donnie Collum, entered a plea of guilty to four (4) separate counts of second degree murder. The Court sentenced the petitioner to four (4) consecutive sentences of forty (40) years on each count without the benefit of probation or parole.

REASONS FOR DENYING THE WRIT

I.

WHETHER A JUVENILE CAN KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL, AND HIS RIGHT AGAINST SELF-INCRIMINATION, IS A QUESTION OF FACT TO BE DETERMINED BY A REVIEW OF THE "TOTALITY OF CIRCUMSTANCES".

Application of the "totality of circumstances" test requires that the State sustain the burden of affirmatively proving that the waiver of rights by a juvenile was made freely and voluntarily. In making such a determination many factors should be considered: 1) the age of the accused; 2) the education of the accused; 3) the knowledge of the accused as to the charge; 4) whether the accused is held incommunicado; 5) whether the accused was interrogated before formal charges; 6) the method used in the interrogation; and 7) the length of interrogation. All of these factors, and any others, should be considered in determining whether or not a juvenile freely, knowingly, and voluntarily waived his constitutional rights against self-incrimination by giving a confession.

The "totality of circumstances" in the present case shows that Donnie Collum, age 15, was no stranger to police procedure or to police authorities, having had previous juvenile delinquent encounters with the law. On the afternoon of his arrest, Donnie Collum was arrested in his mother's presence and advised of the basis of his arrest. He was advised of his constitutional rights and later reminded approximately four or five times of these rights throughout the custodial interrogations. He was first interrogated after a formal arrest warrant had been issued and after he was advised of the police officers' intentions to question him concerning his father's death.

The initial interrogation of Donnie Collum lasted approximately thirty minutes, from 3:00 to 3:30 p.m. This interrogation ceased when the petitioner became nervous and upset. The second interrogation of Donnie Collum lasted approximately forty (40) minutes. He gave a taped interview at which time he admitted committing the four murders. This second interrogation was at the defendant's request. He also acknowledged that he was advised of his rights continuously throughout the interrogations and that he had requested the second interview.

Petitioner has never claimed that he was beaten or coerced, promised anything as an incentive, or induced to confess.

The tape-recorded interviews were offered into evidence by the State at the motion to suppress hearing. They were heard in their entirety by the trial judge and were also heard by the Louisiana Supreme Court. These statements show a careful, slow and deliberate interview free of any hint of impropriety by the officers and show an unrestricted willingness on the part of the petitioner to disclose even the most minute details of the quadruple murders.

The State of Louisiana suggests that the evidence and the record in this case clearly shows that Donnie Collum, age 15, was well aware of his rights and indeed understood that he was giving a statement concerning his involvement in four homicides. The evidence further shows that both the California and Louisiana authorities were extremely cautious in protecting the constitutional rights of the petitioner. The entire testimony of all of the officers involved stands unimpeached and uncontradicted. The taped statements of Donnie Collum were indeed free and voluntary and were not the result of any outside influences or pressures. *State v. Collum*, 365 So. 2d 1272 (La. 1979), *writ denied*, *Collum v. Louisiana*, 444 U.S. 882 (1979).

II.

THE LOUISIANA SUPREME COURT DECISION OF *STATE OF LOUISIANA IN THE INTEREST OF DINO* SHOULD NOT BE APPLIED RETROACTIVELY. *DINO* IS NO LONGER THE LAW OF LOUISIANA.

On June 15, 1978, the Louisiana Supreme Court announced its decision in *State of Louisiana in the Interest of Dino*, 359 So. 2d 586 (La. 1978), wherein it held that a confession of a juvenile was not admissible in evidence unless the juvenile actually consulted with an attorney or an adult before waiving his right to silence. The quadruple murders for which Donnie and Scotty Collum were arrested occurred on May 27, 1977. Donnie Collum entered guilty pleas on February 24, 1978, approximately four months prior to the *Dino* decision.

The present crime, the present confessions, and the present guilty pleas were entered prior to June 15, 1978, the effective date of the *Dino* decision. The Louisiana Supreme Court held that *Dino* would be given prospective application only and would not apply retroactively. *State v. Collum*, *supra*.

The Louisiana Supreme Court relied upon the prevailing rules on retroactivity established in *Johnson v. New Jersey*, 384 U.S. 719, 86 S. Ct. 1772 (1966). The Louisiana Supreme Court reviewed the three (3) part retroactivity test of *Johnson* and concluded: 1) the integrity of the fact-finding process was not affected by *Dino*; 2) the courts and law enforcement had explicitly and correctly relied upon the "totality of circumstances" test; and 3) the detrimental effect that the retroactivity of *Dino* would have on law enforcement. The Louisiana Supreme Court after careful analysis refused to apply *Dino* retroactively. Collum's convictions were affirmed. The United States Supreme Court denied writs. *Collum v. Louisiana*, *supra*.

It should be noted that the Louisiana Supreme Court on April 14, 1998, rendered a decision in *State v. Fernandez*, 712 So. 2d 485 (La. 1998), which specifically overruled *Dino*. Petitioner requests herein that *Dino* be applied retroactively, when in fact *Dino* is no longer the law in Louisiana.

III.

APPLICATION OF ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA), 28 U.S.C.A. § 2253, *et seq.*, TO PETITIONER'S CLAIMS.

A. Application Of AEDPA To Petitioner's Claim Concerning Voluntary Nature Of Confession.

The relevant portion of the AEDPA, codified at 28 U.S.C. § 2254(d), now provides as follows:

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; . . . .

AEDPA requires increased deference that federal courts must give to the prior judgments rendered by the state courts on the merits of a habeas petitioner's claims.

The trial judge's factual findings with respect to the statements given by petitioner to both the California and Louisiana authorities were based not only on the testimony adduced at the suppression hearing, but also upon the Court's review of the audio tape recordings of the statements. These factual determinations are entitled to a presumption of correctness under AEDPA. *Carter v. Johnson*, 110 F.3d 1098, 1108-09 (5th Cir. 1997).

The trial judge's per curiam opinion was issued on December 13, 1977. On February 24, 1978, over two months later, Collum pled guilty to four charges of second degree murder pursuant to a plea agreement with the State. A review of the transcript of the guilty plea proceedings readily demonstrates that petitioner's pleas were knowingly, voluntarily and intelligently entered and therefore pass constitutional muster. During the course of that proceeding, Collum acknowledged understanding that by pleading guilty he was admitting to killing his father, step-mother, half-brother, and half-sister.

On direct appeal, the Louisiana Supreme Court also concluded, after reviewing the suppression hearing testimony and the taped confessions themselves, that Collum's statements were freely and voluntarily given under the "totality of circumstances", the applicable constitutional standard both then and now. The Louisiana Supreme Court also found that the statements were ". . . free of any hint of impropriety by the officers . . ." and reflected ". . . an unrestricted willingness on the part of petitioner to disclose even the most minute details of the offenses," such as the location of the murder weapon. *Collum*, 365 So. 2d at 1278-80.

To overcome the presumption of correctness accorded to the state court's factual findings, Collum must now come

forward with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Given the state court's factual finding that Collum was advised of his *Miranda* rights several times before confessing and that no promises, threats, force or intimidation were used by authorities, there is no evidence to suggest that the state court's conclusions were clearly erroneous.

B. Application Of AEDPA To Petitioner's Claim Concerning Retroactivity Of *Dino*.

The Louisiana Supreme Court decided the retroactivity issue in *Collum* based on its imminently reasonable, good faith application of United States Supreme Court precedent on the law of retroactivity as it existed at the time. Because *Collum* was not contrary to clearly established federal law, the decision not to apply *Dino* retroactively to the facts of petitioner's case is immune from federal habeas review under 28 U.S.C.A. § 2254(d)(1). *Drinkard v. Johnson*, 97 F.3d 751, 768 (5th Cir. 1996). Petitioner relies on *Griffith v. Kentucky*, 479 U.S. 314 (1987), which was decided nine (9) years after Collum's convictions became final. *Griffith* held that

> a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

In 1989, the United States Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989), concluded that new rules should not be applied retroactively to cases on collateral review and that habeas corpus has always been a collateral remedy. The Court stated: "It is sounder in adjudicating habeas petitions generally

to apply the law prevailing at the time of conviction" rather than to attempt to dispose of habeas cases based on intervening changes in constitutional law. The Fifth Circuit has concluded that "even if *Griffith* established a new rule of constitutional law it should not apply to cases on collateral attack." *Teague* acts as a substantial limitation on the availability of habeas relief by protecting the State's interest in finality. *Wilkerson v. Whitley*, 28 F.3d 498, 506-09 (5th Cir. 1994).

The present application is purely and simply a collateral attack by habeas review. This case should not and does not enjoy the benefit of retroactivity of a new law. Even more compelling is the fact that the "new law" is now no longer the law.

AEDPA permits habeas relief only if the state court decision ". . . was contrary to, or involved an unreasonable application of . . ." clearly established federal law, as announced by the United States Supreme Court. *Carter v. Johnson*, 110 F.3d 1098, 1103 (5th Cir. 1997). This new standard of review, analogized to a "clearly erroneous" standard, precludes federal habeas review of a state court decision if it is one on which reasonable jurists could disagree. *Id.* at 1108 (citing *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997), *overruled in part by Lindh v. Murphy*, 117 S. Ct. 2059 (1997)).

> "In effect, a reasonable good faith application of Supreme Court precedent will immunize the state court conviction from federal habeas reversal, even if federal courts later reject that view of the applicable precedent."

Carter, 110 F.3d at 1108 (citing *Mata v. Johnson*, 99 F.3d 1261, 1268 (5th Cir. 1996), *vacated in part on other grounds*, 105

F.3d 209 (5th Cir. 1997)); *Collum v. Cain*, No. 97-1432, U.S. District Court, Eastern District of Louisiana (January 30, 1998).

The *Collum* decision by the Louisiana Supreme Court in 1979 was not contrary to clearly established federal law, nor did that decision involve an unreasonable application of clearly established federal law. Hence, petitioner is not entitled to relief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Honorable Supreme Court of the United States should deny the Petition for Writ of Certiorari.

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General
State of Louisiana

WALTER K. NAQUIN, JR.
Counsel of Record
District Attorney
17th Judicial District
Parish of Lafourche
Post Office Box 431
Thibodaux, Louisiana 70302
(504) 447-2003

Attorneys for Respondent